SUPREME COURT, U. S.
FILED
APR 3 1974
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1973
No. 73-1009 Civil

HAYDEN, STONE INCORPORATED, a Delaware corporation, and HS EQUITIES, INC., a corporation,

*Petitioner,*

*vs.*

GUS T. PIANTES and MARY M. PIANTES, his wife,

*Respondents.*

HAYDEN, STONE INCORPORATED, a Delaware corporation,

*Petitioner,*

*vs.*

ALEX M. MARKAKIS,

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of the State of Utah.**

## PETITION FOR REHEARING.

WALTER S. WEISS,
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Suite 1900,
Los Angeles, Calif. 90067,
*Counsel for Petitioner.*

*Of Counsel:*
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RICHARD B. WOLF,
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Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

## SUBJECT INDEX


I. Page

Grounds for Rehearing ..... 1

II.

Chronology of the Events ..... 2

III.

Nature of the Case and Questions Presented by the Petition for Writ of Certiorari ..... 3

IV.

The Causes of the Untimely Filing Constitute Intervening Circumstances of Substantial or Controlling Effect ..... 4

V.

The Court Has the Power to Grant a Hearing in a Case Where the Petition for Writ of Certiorari Was Filed Out of Time as a Result of Excusable Neglect and Events Beyond the Petitioner's Control ..... 4

VI.

Because of the Extenuating Circumstances and the Fact That No Prejudice Resulted to Respondents As a Result of the One Day's Delay in Filing the Initial Petition, a Rehearing Should Be Granted in This Case ..... 8

VII.

Conclusion ..... 9


## INDEX TO EXHIBITS


Exhibit A—Affidavit of Walter S. Weiss ..... 1

Exhibit B—Affidavit of Richard B. Wolf ..... 3
Calendars for Years 1972, 1973, 1974.

Exhibit C—Affidavit of Lois G. Andrews ..... 7

## TABLE OF AUTHORITIES CITED


| Cases | Page |
|---|---|
| Department of Banking v. Pink (1942) 317 U.S. 264, 87 L.Ed. 254, 63 S.Ct. 233 | 5 |
| Ray v. Pierson (1967) 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 | 4 |
| Richardson v. Green (1889) 130 U.S. 104, 32 L. Ed. 872, 95 S.Ct. 443 | 5 |
| Schacht v. United States (1970) 398 U.S. 58, 26 L.Ed.2d 44, 90 S.Ct. 1555 | 5 |
| Walter D. Teague III, et al. v. Regional Commissioner of Customs, Region II, et al. (1969) 394 U.S. 977, 22 L.Ed. 756, 89 S.Ct. 1457 | 4, 5 |
| Union National Bank v. Lamb (1949) 337 U.S. 38, 93 L.Ed. 1190, 69 S.Ct. 911 | 6, 7 |
| United Public Workers v. Mitchell (1946) 330 U.S. 75, 91 L.Ed. 754, 67 S.Ct. 556 | 5, 6 |
| Wolfsohn v. Rabb (E.D.Pa., 1951) 11 F.R.D. 254 | 7 |
| **Rules** | |
| Federal Rules of Civil Procedure, Rule 6(a) | 6, 7 |
| Federal Rules of Civil Procedure, Rule 6(b) | 6, 7 |
| Federal Rules of Civil Procedure, Rule 60 | 7 |
| Supreme Court Rules, Rule 34.1 | 7 |
| Supreme Court of the United States, Rule 58(2) | 1, 4 |
| **Statutes** | |
| Uniform Securities Act, Sec. 410 | 3 |
| United States Code, Title 28, Sec. 2101(c) | 2, 4, 5, 6, 7, 9 |
| United States Code, Title 28, Sec. 2103 | 7 |
| United States Constitution, Fourteenth Amendment | 4 |

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*Petitioner,*

*vs.*

ALEX M. MARKAKIS,

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of the State of Utah.**

## PETITION FOR REHEARING.

Petitioner presents its petition for a rehearing of this Court's Order, dated March 25, 1974, denying the Petition for a Writ of Certiorari to the Supreme Court of the State of Utah, and, in support thereof, respectfully shows:

### I.

### Grounds for Rehearing.

The intervening circumstances of substantial or controlling effect, constituting the basis of this Petition (Supreme Court Rule 58(2)), consist of the facts, that

(1) The Petition for Writ of Certiorari in this case was docketed one day out of time due to the excusable neglect of petitioner's counsel in computing the time within which the Petition had to be filed, the intervention of the Christmas holiday season, and the distance and time difference between Los Angeles and Washington, D. C.; and

(2) This is the first opportunity for petitioner to apprise the full court of the causes of tardiness, and to urge the court to grant Certiorari despite the untimely filing of the initial petition.

## II.
## Chronology of the Events.

The judgments of the Supreme Court of the State of Utah were made and entered on September 27, 1973. Under Section 2101(c) of Title 28 of the United States Code, the last day for filing a Petition for Writ of Certiorari was, therefore, December 26, 1973. The Petition was received by the Clerk of this Court at 9:00 A.M., on December 27, 1973.

On or about January 14, 1974, petitioner presented to Mr. Justice White an Application for Extension of Time to File the Petition for Writ of Certiorari out of time. The Application was denied on January 17, 1974.

On January 22, 1974, the attorney for respondents wrote a letter to the Clerk of the Court, stating that, because (1) the Petition was filed out of time, (2) the Application for Extension of Time had been denied, and (3) the case "clearly does not warrant review by this Court (as shown by the Opinion of the Utah Supreme Court)," respondents waived the right to file a brief in opposition. On February 4, 1974, the

Clerk wrote a letter to the attorney for respondents, stating that the Court had directed him to request that a response be filed in this case.

On or about March 4, 1974, respondents filed a brief in opposition. On or about March 14, 1974, the Attorney General of the State of Utah filed an Amicus Curiae Brief, urging that the Petition for Writ of Certiorari be denied.

On March 25, 1974, the Court denied the Petition for Writ of Certiorari "as untimely filed."

## III.

## Nature of the Case and Questions Presented by the Petition for Writ of Certiorari.

Petitioner, at all times relevant hereto, was a nationwide stock brokerage house licensed to transact business in 42 states and was a member of several major securities exchanges. Respondents are former customers of petitioner. They obtained judgments against petitioner in the amount of $127,873.04. The judgments are in the gross amount of certain of respondents' stock market losses in transactions with petitioner. Liability was imposed under Section 410 of the Uniform Securities Act, because, at the time of the transactions, petitioner had failed to obtain a broker-dealer's license from the Utah Department of Business Regulations. The judgments were affirmed by a published opinion of the Utah Supreme Court.

The questions presented by the Petition for Writ of Certiorari are (1) whether federal regulation of the securities industry preempts the penalty provision imposed upon petitioner under Section 410 of the Uniform Securities Act, (2) whether the application of that

provision unreasonably burdens interstate commerce, and (3) whether the penalty provision violates the due process clause of the Fourteenth Amendment because of the lack of a rational relationship between the purpose of the statute and the imposition of liability without fault.

IV.

**The Causes of the Untimely Filing Constitute Intervening Circumstances of Substantial or Controlling Effect.**

Petitioner has never addressed the full membership of the Court on the subject of the Court's power to grant a petition for writ of certiorari filed out of time. Since the Court denied the Petition "as untimely filed," the extenuating circumstances explaining the tardy filing of the Petition constitute "intervening circumstances of substantial or controlling effect," within the meaning of Rule 58(2) of this Court.

V.

**The Court Has the Power to Grant a Hearing in a Case Where the Petition for Writ of Certiorari Was Filed Out of Time as a Result of Excusable Neglect and Events Beyond the Petitioner's Control.**

The most persuasive evidence of the power of the United States Supreme Court to grant certiorari and decide on the merits civil cases in which the petition for a hearing was filed after the ninety-day period of 28 U.S.C. §2101(c), is the simple fact that in recent years the Court has done so. (See *e.g., Ray v. Pierson* (1967) 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213; cited in dissent by Mr. Justice Black (joined by Mr. Justice Douglas) from a denial of certiorari in *Walter D. Teague III, et al. v. Regional Commissioner of Cus-*

*toms, Region II, et al.* (1969) 394 U.S. 977, 22 L.Ed. 756, 760, 89 S.Ct. 1457.) Such a practice is consistent with cases decided under the predecessors of Section 2102(c), holding that the Court has power to waive the time requirements in appropriate cases on appeal. (See, *e.g., Richardson v. Green* (1889) 130 U.S. 104, 111, 32 L.Ed. 872, 874, 95 S.Ct. 443.)

Some of the decisions of the Court have suggested that, while the Court has power to waive the requirements of its own rules, it lacks the power to waive time limits established by statute. (See, *e.g., Schacht v. United States* (1970) 398 U.S. 58, 63-64, 26 L. Ed.2d 44, 49, 90 S.Ct. 1555.) Aside from the fact that such statements, as well as the "jurisdictional" language contained in cases denying certiorari (*e.g., Department of Banking v. Pink* (1942) 317 U.S. 264, 268, 87 L.Ed. 254, 257, 63 S.Ct. 233), is refuted by the Court's practice of granting certiorari in civil cases of late filing, there is express authority by the Court that the supposed distinction between rule and statute is not controlling. In *United Public Workers v. Mitchell* (1946) 330 U.S. 75, 91 L.Ed. 754, 67 S.Ct. 556, the Court considered the effect of the statutory time limit for docketing a record on appeal. The statute involved read as follows:

> "In the event that an appeal is taken under this section, the record *shall* be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts." (Former 28 U.S.C.A. §380a, 8 F.C.A. Title 28, §380a. Emphasis added.)

The Court held that compliance with the provisions of the statute as to docketing the record on appeal, although phrased in mandatory language, was *not* a "prerequisite to the power of this Court to review . . . We do not construe the requirement of docketing within sixty days as a limitation on our *power* to hear this appeal." (330 U.S. at 85-86, 91 L.Ed. at 765. Emphasis added.)

In circumstances such as these, the Court should draw upon the policy fostered by Congress in its concurrence with the provisions of Rule 6(b) of the Rules of Civil Procedure for the United States District Courts, which reads in relevant part as follows:

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done *where the failure to act was the result of excusable neglect. . . .*" (Emphasis added.)

Such an approach was taken by the Court in *Union National Bank v. Lamb* (1949) 337 U.S. 38, 93 L. Ed. 1190, 69 S.Ct. 911. That case presented a factual setting very similar to that of the case at bench. There, the last day for filing a petition under §2101-(c)—the same statute involved here—fell on a Sunday. The petition was filed the next day. There was no statutory provision allowing for such late filing. The Court invoked the lenient policy of Rule 6(a) of the Federal Rules of Civil Procedure, applicable by its terms only to proceedings in the District Courts, and granted a hearing in the case. That Rule, the equivalent of pres-

ent Rule 34.1 of the Supreme Court Rules, provided that, when the last day for performance of an act fell on a Sunday or legal holiday, performance on the next day which is not a Sunday or legal holiday is timely. In finding that the policy articulated by the Rule constituted a gloss upon §2101(c), the Court stated as follows:

> "That rule provides the method for computation of time prescribed or allowed not only by the rules or by order of court but by 'any applicable statute.' Since the rule had the concurrence of Congress, and since no contrary policy is expressed in the statute governing this review, we think that the considerations of liberality and leniency which find expression in Rule 6(a) are equally applicable to 28 U.S.C. 1948 ed. §2101(c). The appeal[1] therefore did not fail for lack of timeliness." (337 U.S. at 40-41, 93 L.Ed. at 1194. Court's footnotes omitted.)

Under a similar analysis, it is seen that the same statute, §2101(c), is no more in conflict with subdivision (b) of Rule 6 than with the provisions of subdivision (a) of that rule. Nor is there any conflict between Rule 6(b) and the Supreme Court Rules. Therefore, the lenient policy of Rule 6(b) should apply, and this Petition should be granted. (*Wolfsohn v. Rabb* (E.D.Pa., 1951) 11 F.R.D. 254 [attorney's miscalculation of time by one day constituted excusable neglect within meaning of similar language of Rule 60 of Federal Rules of Civil Procedure].)

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[1]Although the petitioner sought to bring the case to the Supreme Court by appeal, the proceeding was treated as a Petition for Certiorari, pursuant to 28 U.S.C., §2103. (337 U.S. at 39-40, 93 L.Ed. at 1193.)

## VI.

**Because of the Extenuating Circumstances and the Fact That No Prejudice Resulted to Respondents as a Result of the One Day's Delay in Filing the Initial Petition, a Rehearing Should Be Granted in This Case.**

The unfortunate circumstances surrounding the untimely filing of the Petition for Writ of Certiorari are recited in detail in the affidavits of Walter S. Weiss, Richard B. Wolf and Lois G. Andrews, attached hereto as Exhibits A, B, and C, respectively, and incorporated herein by reference. As can be seen from a review of the affidavits, a bizarre repetition of errors in computation of the due date of the Petition for Writ of Certiorari, compounded by the intervention of four consecutive court and business holidays, and the distance and time difference between Los Angeles and Washington, D.C., caused the filing of the Petition to be one day late. This is not a case where the statute or the rules of the Supreme Court of the United States were disregarded by petitioner. To the contrary, as shown in the affidavit of Richard B. Wolf, efforts were made to coordinate the preparation and printing of the Petition for Writ of Certiorari for the express purpose of filing the Petition ahead of the supposed deadline. Despite the error in computation, it appears from the affidavits that, had the printer not suspended its operations on December 24, 1973 (as was originally stated to petitioner's counsel would not be the case), the Petition would have been filed by December 26, 1973, and thus would have been timely. The problem encountered by petitioner, therefore, was that, even though petitioner's counsel worked over the weekend to have the Petition filed ahead of time, the intervention of four

consecutive business holidays (Dec. 22, 23, 24 and 25), rendered the effort futile.

Absolutely no prejudice resulted to respondents as a result of the delay of one day in the filing of the Petition for Writ of Certiorari. Respondents, having been alerted to the untimely filing by petitioner's straightforward attempt to obtain relief by application to Mr. Justice White, asserted in their opposition brief that a failure to comply with §2101(c) precludes the Court from considering the Petition. However, respondents did not advert to a single fact or circumstance showing that respondents had suffered any prejudice by reason of the delay. In view of the lack of prejudice to respondents, the notion of fairness, combined with the preference for a hearing on the merits of a matter presenting the important issues involved in this case, should cause the Court to reconsider its denial of the initial Petition.

## VII.

## Conclusion.

For the foregoing reasons, it is respectfully urged that this Petition for a Rehearing be granted, and that upon further consideration, Writ of Certiorari issue to the Supreme Court of the State of Utah.

Dated: April 2, 1974.

WALTER S. WEISS,
*Counsel for Petitioner.*

*Of Counsel:*
LONG & LEVIT,
RICHARD B. WOLF,
LOIS G. ANDREWS,

**Certificate of Counsel.**

I, WALTER S. WEISS, counsel for the above-named petitioner, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, Subdivision 2, of the Rules of this Court.

Dated: April 2, 1974.

WALTER S. WEISS,
*Counsel for Petitioner.*

## EXHIBIT A.

### Affidavit of Walter S. Weiss.

State of California,
County of Los Angeles—ss.

WALTER S. WEISS, duly sworn, says:

1. I am a member of the bar of this Court, duly licensed to practice law in the State of California and the Los Angeles managing partner of the firm of Long & Levit. I had primary responsibility for the final preparation of the Petition for Writ of Certiorari in the above action.

2. Although Long & Levit took no active part in either the trial or appeal in the Utah courts, this law firm was involved initially in the controversy, since the San Diego, California, office of petitioner was involved in the proceedings. After the decision of the Supreme Court of Utah was rendered, I had discussions with our client during October and November, 1973, concerning the possibility of filing a petition for writ of certiorari.

3. Although petitioner was initially uncertain in deciding whether a petition for writ of certiorari would be filed, when the decision in this Court in *Merrill Lynch v. Ware* was announced on December 4, 1973, we were instructed to proceed forthwith in preparing the petition.

4. After I received these instructions from our client, I made a calculation of the time within which the petition had to be filed. In doing this, I consulted my calendar and determined that the decision of the Supreme Court of Utah was rendered on the 270th day of 1973. I excluded that day and added 90 to day

271 and thereby determined, albeit erroneously, that the last day for filing a petition was the 361st day of 1973, which was December 27, 1973. I told Lois G. Andrews and Richard B. Wolf of my calculation and requested that each independently verify this rather tight time schedule. Each assured me that the last day for filing a petition was December 27, 1973.

5. I reviewed the original draft of the Petition and participated in revising the galley proofs. The revision of the galley proofs took place on December 22, 23, and 24, 1973. The corrected galley proofs were redelivered to the printer for final preparation some time after noon on December 24, 1973. But for the distance and time difference between Los Angeles and Washington, D.C., and the intervening 4 court holidays, the Petition would have been printed and filed not later than the 89th day.

6. I am unaware of any prejudice which might result to the respondents if this petition is granted.

/s/ Walter S. Weiss
WALTER S. WEISS

Subscribed and sworn to before me this 2nd day of April, 1974.

/s/ Ingrid Neustadter
Notary Public in and for said
County and State.

## EXHIBIT B.

### Affidavit of Richard B. Wolf.

State of California,
County of Los Angeles—ss.

RICHARD B. WOLF, being first duly sworn, states:

1. I am an attorney licensed to practice law in the State of California, and in the United States District Court for the Central District of the State of California.

2. I am an associate in the law firm of Long & Levit and am of counsel for petitioner in the above action on the Petition for Writ of Certiorari to the Supreme Court of the State of Utah.

3. In Mid-December, 1973, I was assigned responsibility for preparing said Petition, and causing the same to be filed in the Supreme Court of the United States. At that time I inquired of Lois G. Andrews, an associate also working on the Petition, when the time for filing a petition would expire. I was informed that it was either the 26th or the 27th of December, depending upon whether the date of entry of the judgment by the Utah Supreme Court was taken as the first day of the statutory period, or whether that day was omitted.

4. On or about December 14, 1973, I decided to ascertain for myself the last day for filing a petition, in order that the scheduling with the printer could be properly made. Twice on December 14, 1973, I counted off the statutory 90 day period following September 27, 1973, the date upon which the judgment in the Utah Court had been entered. Each time the 90th day appeared to fall on December 27, 1973. Attached hereto, marked Exhibit 1 and incorporated herein by reference is a true and correct copy of the calendar

which I used in counting the 90 day period. The pencilled notations upon the calendar were made by me during the process of counting. It is now apparent from examining the calendar why the error was made. The 30th day of September appears on the calendar in the upper lefthand corner of the space devoted to September, 1973. I thus omitted counting the 30th of September, 1973, and proceeded directly from the 29th of September to October 1, 1973, I am confident that the error would not have been made. had the calendar not been printed in such a misleading manner.

5. On December 17, 1973, I telephoned Parker & Son, Inc. ("Parker") and spoke with Miss Jean Drennen. Based upon the time computation described in the preceding paragraph, I informed her that the Petition was due to be filed on or before December 27, 1973. I inquired as to what schedule would have to be followed, in view of the intervening holidays, in order to meet that deadline. Upon my inquiry, Miss Drennen stated that Parker would be open and operating on December 24, 1973, Christmas Eve. She told me that, if our rough draft was received by Parker early Friday, December 21, 1973, the printer would work overtime over the weekend, and Parker would deliver galley proofs to us by Saturday, December 22, 1973. She stated that, if the corrected galley proofs were received back by Parker by December 26, 1973, Parker would arrange for the Petition to be filed in the Supreme Court of the United States by December 27, 1973. I stated that I did not want to "cut it so close," and that we would endeavor to return the corrected galley proofs to them by Monday, December 24, 1973, in order that the Petition could be filed by December 26, 1973.

6. From December 17, 1973, through December 21, 1973, I participated with Mrs. Andrews and Walter S. Weiss, attorney for petitioner, in the composition and revision of the Petition. On December 21, 1973, I telephoned Parker to make arrangements to have the rough draft picked up in order that the galleys could be printed. On that day, for the first time, I was informed by Miss Drennen that Parker would not be open and operating on the afternoon of December 24, 1973. At noon on December 21, 1973, Parker picked up the rough draft of the Petition.

7. At approximately 11:00 A.M. on December 22, 1973, Parker returned the galley proofs of the Petition to our office. On December 22, 23 and the morning of December 24, 1973, Mrs. Andrews, Mr. Weiss and I revised the galley proofs.

8. On December 24, 1973, I telephoned Parker and made arrangements for the pickup of the revised galley proofs. They were picked up by Parker at 12:30 P.M., December 24, 1973.

9. After learning that the Petition had been filed one day late, I telephoned Parker and ascertained that the completed Petition left Parker's premises at 7:00 P.M. on December 26, 1973, and that it was placed aboard the air freight compartment of American Airlines, Flight 378. That flight left Los Angeles International Airport at 10:35 P.M. (Pacific Standard Time) on the 26th and arrived at Dulles International Airport, Washington, D.C., at 7:32 A.M. (Eastern Standard Time) December 27, 1973. The Petition was served upon opposing counsel on December 26, 1973.

10. I was informed by the Assistant Clerk of the Supreme Court of the United States that the Petition

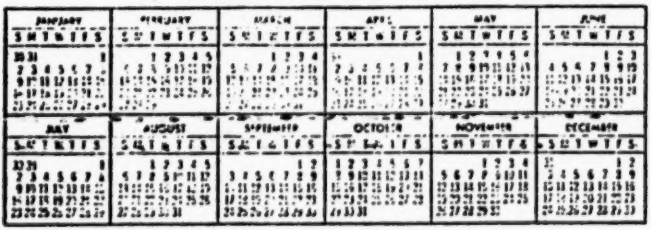
was filed at 9:00 A.M. (Eastern Standard Time) on December 27, 1973.

/s/ Richard B. Wolf
RICHARD B. WOLF

Subscribed and Sworn to before me this 27th day of March, 1974.

/s/ Ingrid Neustadter
Notary Public in and for said County and State.

## CALENDAR FOR 1972



## CALENDAR FOR 1973

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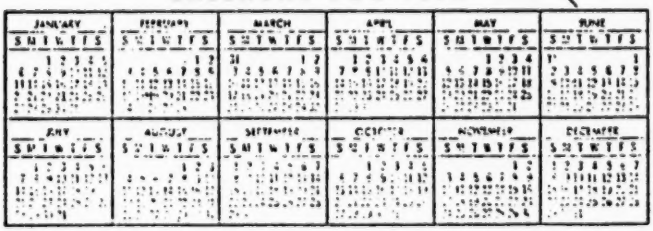
## CALENDAR FOR 1974



## EXHIBIT C.

### Affidavit of Lois G. Andrews.

State of California, County of Los Angeles—ss:

LOIS G. ANDREWS, being duly sworn, says:

1. I am licensed to practice law in the State of California, and in the United States District Court for the Central District of the State of California.

2. I am of counsel on the Petition for Writ of Certiorari in the above action. I participated in the writing of the Petition and in causing the same to be filed in the United States Supreme Court.

3. When I was assigned this case and began work on it, I made a determination of when the Petition was due to be filed. I first counted the time by weeks, starting on Thursday, September 27, 1973, the day that the judgment was entered in the Utah Supreme Court. I counted the period intervening between each successive Thursday as seven days. I went through this process twice, both times calculating that the due date was Wednesday, December 26, 1973, which was in fact the correct date. To confirm my calculations, I counted each day separately. Commencing with September 27 as the first day I counted ninety days, coming up again with December 26. I repeated this process in order to be absolutely sure that the Petition would be filed on time. Although I arrived at the correct date, I did so only because of two offsetting errors. The first error was counting the day the judgment was entered as day "one." The second error was failing to count September 30, due to its obscure placement on my calendar. I was aware of the possibility of the former error but, unfortunately, not of the latter error.

4. In mid-December, Walter S. Weiss, counsel in this cause, conferred with Richard B. Wolf, of counsel, and myself, concerning this case. During this conference I was asked when the Petition was due. I answered that it was due either December 26 or December 27, depending upon whether the day judgment was entered was counted as the first day. Shortly thereafter, upon the request of Mr. Weiss, I undertook to determine the rule governing the method by which time is computed for purposes of Supreme Court filings. I looked up Supreme Court Rule 34.1 which provides in pertinent part:

> "In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default, after which the designated period of time begins to run is not to be included."

5. Learning that September 27 was not to be counted as the first day, it seemed logical, based upon my previous time computations, that December 27 would be the last day to file the Petition. However, I was not satisfied to rely upon such a deduction and undertook to recalculate the due date. I proceeded by the same two methods I had used previously, again going through each process twice. In each case I counted September 28 as the first day. Since I again omitted September 30 under the daily counting method, under both methods I arrived at December 27 as the date the Petition was due. I was confident that December 27, 1973, was the correct date because (1) each method of time computation had confirmed the result of the other, and (2) the result of December 27, reached in computations made after I became aware of Rule 34.1,

appeared to be consistent with the previous result of December 26.

5. I started writing the Petition on Friday, December 14, 1973. On that day, in a conference with Richard Wolf, the question as to the time available again arose. While in my presence, Mr. Wolf, using a different calendar than I had used, counted the days twice. Each time December 27 appeared to be the 90th day. Since Mr. Wolf's counting confirmed my counting and calculations, I was by this time positive that December 27 was, in fact, the 90th day.

/s/ Lois G. Andrews
LOIS G. ANDREWS

Subscribed and Sworn to Before Me This 27th day of March, 1974.

/s/ Ingrid Neustadter
Notary Public in and for said County and State.